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Consumer Protection

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CONSUMER PROTECTION

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THE CIVIL CODE AS A SOURCE OF CONSUMER PROTECTION

The Obligation to Perform in Good Faith

If one were to peruse the Civil Code of Louisiana seeking principles that would provide a potential source of consumer protection, article 1901 would soon present itself as a likely starting point. In article 1901's "must be performed with good faith" language, in combination with Civil Code articles such as 2474,[1] can be seen an approach to contract law that contrasts sharply with the common law tradition of caveat emptor. One could only be disappointed at the discovery, however, that the good faith performance principle has not become an important ingredient in consumer protection law in Louisiana, except with respect to redhibition and attempted waiver of redhibition by sellers not in good faith.[2] In short, Louisiana courts have only infrequently applied the good faith performance principle, rendering it a sort of Civil Code sphinx. *Gautreau v. Southern Farm Bureau Casualty Insurance Co.*[3] presents a *sub silentio* application of the good faith performance principle and perhaps serves as an indication that this aspect of article 1901 may be yet rediscovered.

Before the third circuit in *Gautreau* was the question of an insurer's right, pursuant to an express contractual stipulation, to arbitrarily refuse to renew an insurance policy; that is, to refuse to renew a policy in the absence of some objective basis therefor. Judge Doucet, in an opinion concurred in by three of the remaining four judges on the panel, held that there was an implied covenant of good faith and fair dealing in the insurance policy which precluded the insurer from refusing to renew for arbitrary and capricious reasons. The adhesive nature of insurance policies, in combination with the quasi-public nature of the product and the public trust in insurers as fiduciaries, provided the foundation for the implied covenant.

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1. "The seller is bound to explain himself clearly respecting the extent of his obligations: any obscure or ambiguous clause is construed against him." LA. CIV. CODE art. 2474.

2. *See* LA. CIV. CODE arts. 2545 & 2548.

3. 410 So. 2d 815 (La. App. 3d Cir. 1982).

Article 1901's good faith performance principle is not mentioned in *Gautreau*. Had the case been decided under the principle of good faith performance, the ramifications of *Gautreau* might be wide-ranging, extending perhaps to the relationship between buyer and seller, lessor and lessee, homeowner and mortgage lender,[4] franchisor and franchisee, merchant and customer, and even lawyer and client. As is, the case may be doomed to ply the backwaters of "insurance" law.

On the positive side, the opinion by Judge Doucet in *Gautreau* shows an awareness of a judicial responsibility to closely scrutinize a contract of adhesion between parties of immensely disparate bargaining power. Perhaps as Louisiana courts begin to formulate an approach to that problem, the good faith performance principle of article 1901 will emerge as an important ingredient in the overall picture.

Damages in Consumer Contracts

One issue having significant consumer interest ramifications that has been before Louisiana courts in recent years is the scope of the following language found in Civil Code article 1934(3): "Where the contract has for its object the gratification of some intellectual enjoyment . . ., or some convenience or other legal gratification, although these are not appreciated in money by the parties, yet damages are due for their breach . . . ." Because most nonconsumer transactions involve a profit motive on the part of both parties, article 1934(3) would ordinarily not apply to such transactions; but the article has obvious application to the consumer transaction, wherein the consumer's motive typically is not "appreciated in money." The decisions of the Louisiana Supreme Court in *Meador v. Toyota of Jefferson, Inc.*[5] and *Ostrowe v. Darensbourg*[6] for the time being ended any broad significance article 1934(3) might have assumed as a Civil Code source of protection for the consumer suffering mental anguish, inconvenience, or other "nonpecuniary" damages. *Meador* interpreted article 1934(3) to require that intellectual enjoyment be a principal or exclusive object of the contract[7] and held that automobile repair was not such an object. *Ostrowe* then held that a distinctively planned home was not within the reach of article 1934(3).[8]

4. An "at will" acceleration clause in a negotiable instrument may not be utilized by a creditor unless he in good faith believes that the prospect of payment or performance is impaired. LA. R.S. 10:1-208 (Supp. 1974).

5. 332 So. 2d 433 (La. 1976).

6. 377 So. 2d 1201 (La. 1979).

7. 332 So. 2d at 437.

8. 377 So. 2d at 1203. *See* Hersbergen, *Developments in the Law, 1979-1980—Consumer Protection*, 41 LA. L. REV. 443, 470-71 (1981).

Within a year of *Ostrowe* the Louisiana Supreme Court seemed prepared to reassess the issue in *Gele v. Markey*,[9] a case involving a profit motive and merchant plaintiffs. A failure of proof on the damages issue rendered moot the issue of the classification of the plaintiff's object in the contract, but the opinion of Justice Dennis does indicate that the courts of appeal should not decide the *Meador* issue as a matter of law. *Meador* and *Ostrowe* can be read as removing entire categories of consumer contracts from the scope of 1934(3); that is, automobile repair and home construction contracts, for example, can never have as a principal object the satisfaction of intellectual enjoyment. The courts of appeal have apparently so understood *Meador* and *Ostrowe*.[10] The *Gele* decision, however, may signal greater flexibility in applying article 1934(3). A breach of contract for air travel for the purpose of a vacation, for instance, was subsequently held to be within article 1934(3) in *Vick v. National Airlines, Inc.*[11] The court expressly avoided the suggestion that any contract foreseeably affecting one's vacation plans would yield awardable mental anguish damages.[12]

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9. 387 So. 2d 1162 (La. 1980).

10. *See* Williamson v. Alewine, 417 So. 2d 64 (La. App. 3d Cir. 1982) (breach of contract to repair an automobile); Guthrie v. Rudy Brown Builders, Inc., 416 So. 2d 590 (La. App. 5th Cir. 1982) (home purchase); Cobb v. Coleman Oldsmobile, Inc., 393 So. 2d 402 (La. App. 1st Cir. 1980) (automobile purchase); Walker v. Western-Southern Life Ins. Co., 391 So. 2d 925 (La. App. 2d Cir. 1980) (failure to pay benefits under an employee's disability policy); Elliott v. Louisiana Intrastate Gas Corp., 390 So. 2d 571 (La. App. 3d Cir. 1980) (granting of a servitude for purpose of laying a gas pipeline); Martin v. AAA Brick Co., 386 So. 2d 987 (La. App. 3d Cir. 1980) (construction of fireplace); Bowes v. Fox-Stanley Photo Prods., Inc., 379 So. 2d 844 (La. App. 4th Cir. 1980) (contract for processing vacation films).

11. 409 So. 2d 383 (La. App. 4th Cir. 1982). In Schreck v. One Hour Martinizing, Inc., 394 So. 2d 838 (La. App. 4th Cir. 1981), the mental anguish suffered by the plaintiff when a dry cleaner ruined an expensive dress was viewed as compensable under article 1934(3), but as in *Gele* the plaintiff failed to prove any such damages.

12. Despite our holding, we do not mean to imply that any airline passenger who misses a connecting flight is entitled to recovery from the airline. We are aware that missed flights occur from time to time and that the airlines provide passengers with hotel accommodations or alternate flights to rectify the travelers' problems. We are also aware of the problems and delays caused by bad weather; however, the Vicks purchased tickets for a non-stop flight but were not informed beforehand of National's decision, for business reasons or otherwise, to change the flight plan. Plaintiffs were subjected to an unscheduled stop and delay in Pensacola under adverse weather conditions and were not afforded reasonable assistance by National personnel either there or in Miami to arrange alternate accommodations. Defendant's failure was in not adequately informing plaintiffs of the changed flight schedule and in being callous to the problems caused by the delays and the airline's decision to make an unannounced stop in Pensacola. Plaintiffs are entitled to recovery.

409 So. 2d at 386.

UNFAIR OR DECEPTIVE ACTS OR PRACTICES

Among the many recommendations made to Congress by the National Commission on Consumer Finance in its 1972 report, *Consumer Credit in the United States*, was that no creditor should be permitted to commence any legal action against a consumer debtor in a location other than (1) where the contract or note was signed or (2) where the debtor resided at the time of signing, or resides at the time the suit is filed or (3) if there are "fixtures," where the goods are affixed to real property.[13] The practice of filing debt collection suits in inconvenient venues or forums was found by the Commission to result in default judgments and denial of reasonable opportunities for debtors to defend claims.[14] In *Bank of New Orleans & Trust Co. v. Phillips*,[15] the intentional filing of a collection suit in the wrong (and presumably inconvenient) venue was characterized as an act of harassment to the debtor tantamount to an abuse of process and held by the fourth circuit to be an unfair trade practice under the Louisiana Unfair Trade Practices and Consumer Protection Law.[16]

The successful consumer plaintiff in an unfair trade practices case is entitled to an award of provable actual damages and upon proof thereof, reasonable attorney's fees and costs.[17] In the *Phillips* case the defendant bank sought to avoid such an award by arguing that the Unfair Trade Practices Act exempted *any* alleged unfair practices the defendant may have committed, because Louisiana Revised Statutes 51:1406 exempts from the Act "actions or transactions subject to the jurisdiction of . . . the state bank commissioner . . . ." The Louisiana State Bank Commissioner (now the Louisiana Commissioner of Financial Institutions) does in fact exercise jurisdiction over banking actions and transactions, as a general matter, pursuant to Louisiana Revised Statutes 6:151. The debt in *Phillips* arose out of a revolving loan credit card account (VISA), and although ostensibly such a debt is simply a revolving loan plan, easily within the usual meaning of "banking," the court held that "bank credit card trans-

13. NATIONAL COMMISSION ON CONSUMER FINANCE, CONSUMER CREDIT IN THE UNITED STATES 41-42 (1972). *See also Recommendations of the National Commission on Consumer Finance*, 5 U.C.C. L.J. 319, 329 (1973).

14. CONSUMER CREDIT IN THE UNITED STATES, *supra* note 13, at 41-42. The National Commission on Consumer Finance noted in its report that in approximately 65 percent of all court cases in its *Collection Practices and Creditors' Remedies Survey*, the consumer debtor failed to appear and judgment was entered by default. CONSUMER CREDIT IN THE UNITED STATES, *supra* note 13, at 30. In 2 D. CAPLOVITZ, DEBTORS IN DEFAULT 11-68 (1971), only one in five consumers was found to have sought legal assistance when sued on a debt.

15. 415 So. 2d 973 (La. App. 4th Cir. 1982).

16. LA. R.S. 15:1401-1413 (Supp. 1972).

17. LA. R.S. 51:1409(A) (Supp. 1972).

actions are no longer within the jurisdiction of the State Banking Commissioner."[18] Therefore, the exemption language of Louisiana Revised Statutes 51:1406 was of no help to the bank.

To concede the debatable issue regarding the loss of the Commissioner's jurisdiction over credit card transactions under title 6[19] does not necessarily end the inquiry, for the bank credit card transaction is clearly subject to the provisions of the Louisiana Consumer Credit Law,[20] a law also administered by the Commissioner of Financial Institutions.[21] Even so, one certainly could argue that the Commissioner's scope of jurisdiction under the Credit Law is not so broad as to exempt the bank's actions in *Phillips*. Under the Credit Law, the permissible rate of loan finance charges on lender credit card accounts is regulated,[22] but the rate imposed by the bank was not the "action or transaction" complained of in *Phillips*. The Credit Law does regulate the collection activities of banks and other creditors, but the scope of that regulation would not encompass the "inconvenient venue" problem.[23]

The consumer aggrieved by the unfair trade practice and who thereby suffers "any ascertainable loss of money or movable property . . . , may bring an action . . . to recover actual damages."[24] But by definition, a consumer transaction is not typically motivated primarily by profit potential, and thus the damages suffered by an aggrieved consumer are not usually "appreciated in money." *Vick v. National Airlines, Inc.*[25] is a fitting example. What then did the legislature intend by the phrase "actual damages" in the context of an unfair trade practice? According to *Phillips*, the word *actual* means what the dictionary says it means: "real," "genuine," "existing in fact."[26] That, in turn, translated into humiliation and mental anguish, and the $250 award by the lower court was affirmed. An action pursuant to state unfair trade practices statutes will very probably be the national remedy of choice for consumers in the 1980's and beyond. Given

18. 415 So. 2d at 975.

19. The court relies on Act 466 of 1974, a stance criticized in Hersbergen, *Developments in the Law, 1981-1982—Banking Law*, 43 LA. L. REV. 309 (1982).

20. LA. R.S. 9:3510-3571 (Supp. 1972).

21. LA. R.S. 9:3516(8), 3551, & 3555 (Supp. 1972). In addition to repealing LA. R.S. 6:965-969, Act 466 of 1974 amended and reenacted all or portions of LA. R.S. 9:3515, 3516, 3524, 3526, 3530, 3539, 3561, 3563, 3564, & 3565, all being part of the Consumer Credit Law.

22. LA. R.S. 9:3524 (Supp. 1972 & 1974).

23. LA. R.S. 9:3562 (Supp. 1972 & 1974).

24. LA. R.S. 51:1409(A) (Supp. 1972).

25. 409 So. 2d 383 (La. App. 4th Cir. 1982).

26. 415 So. 2d at 976.

the possibility of an award of attorney's fees,[27] actions that could be styled as breach of contract, redhibition (breach of implied warranty), wrongful seizure, abuse of process, and other tortious acts are coming before the courts as unfair or deceptive trade practices cases.[28] Because automobile sales and servicing account for the largest single category of consumer complaints,[29] it is not surprising that a significant number of unfair trade practices cases involve defective automobiles,[30] automobile warranties,[31] automobile repairs,[32] and other unfair or deceptive practices with respect to automobiles.[33]

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27. In the event that damages are awarded under LA. R.S. 51:1409(A), that subsection mandates an award of reasonable attorney's fees and costs. In *Phillips* the $700 attorney's fee award was affirmed. The court did not discuss increasing the award to cover the added legal expense of defending the appeal. In a redhibition case it is not uncommon to increase the successful buyer's attorney's fee award on appeal. *See, e.g.*, White v. Martin GMC Trucks, Inc., 359 So. 2d 1094 (La. App. 3d Cir. 1978); Boudreaux v. Mazda Motors of Am., Inc., 347 So. 2d 504 (La. App. 4th Cir. 1977); Weaver v. Fleetwood Homes of Miss., Inc., 327 So. 2d 172 (La. App. 3d Cir. 1976).

28. *See, e.g.*, Brunwasser v. Trans World Airlines, Inc., 541 F. Supp. 1338 (W.D. Pa. 1982) (breach of contract, similar to *Vick v. National Airlines, Inc.*); Watkins v. Roach Cadillac, Inc., 637 P.2d 458 (Kan. App. 1981) (lease of a vehicle); Gour v. Daray Motor Co., 373 So. 2d 571 (La. App. 3d Cir. 1979) (arguably a vice of consent and a Civil Code article 2529 redhibition case); Moore v. Goodyear Tire & Rubber Co., 364 So. 2d 630 (La. App. 2d Cir. 1978) (wrongful seizure); Kopischke v. First Continental Corp., 610 P.2d 668 (Mont. 1980) (automobile personal injury); Dowling v. NADW Mktg., Inc., 625 S.W.2d 392 (Tex. Civ. App.), *rev'd*, 631 S.W.2d 726 (1981) (purchase of a distributorship); Kilgore Fed. Sav. & Loan v. Donnelly, 624 S.W.2d 933 (Tex. Civ. App. 1981) (conversion of a savings certificate); Ybarra v. Soldana, 624 S.W.2d 948 (Tex. Civ. App. 1981) (home construction contract); DeBakey v. Staggs, 612 S.W.2d 924 (Tex. 1981) (legal malpractice); Thomas v. French, 638 P.2d 613 (Wash. App. 1981) (breach of contract of training in cosmetology).

29. About 20% of all inquiries handled by the Office of Consumer Protection, Department of Urban and Community Affairs, for the State of Louisiana each month concern sales and repairs of automobiles. Mobile homes account for another 2% of the inquiries.

30. *See* Plaza Pontiac, Inc. v. Shaw, 282 S.E.2d 383 (Ga. App. 1981) (undisclosed prior damage); Kopischke v. First Continental Corp., 610 P.2d 668 (Mont. 1980) (defective steering); Jordan Ford, Inc. v. Alsbury, 625 S.W.2d 1 (Tex. Civ. App. 1981) (defective paint job); Chrysler-Plymouth City, Inc. v. Guerrero, 620 S.W.2d 700 (Tex. Civ. App. 1981) (undisclosed prior damages); Helfman Motors, Inc. v. Stockman, 616 S.W.2d 394 (Tex. Civ. App. 1981) (multiple defects in a motor home).

31. *See* Jacobs v. Rosemount Dodge-Winnebago South, 310 N.W.2d 71 (Minn. 1981).

32. *See* Riviera Motors, Inc. v. Higbee, 609 P.2d 369 (Or. App. 1980) (unauthorized repairs); Charlie Thomas Courtesy Ford v. Avalos, 619 S.W.2d 9 (Tex. Civ. App. 1981) (repair work done with used parts represented as "new").

33. Deception in selling or leasing an automobile has been frequently alleged. *See* Hinchliffe v. American Motors Corp., 440 A.2d 810 (Conn. 1981) (representation as to "full-time four-wheel drive" characteristic); Greenbriar Dodge, Inc. v. May, 273 S.E.2d 186 (Ga. App. 1980) (high pressure "overselling"); Willman v. Ewen, 634 P.2d 1061 (Kan. 1981) (deception in sale of limited production vehicle); Watkins v. Roach Cadillac, Inc., 637 P.2d 458 (Kan. App. 1981) (leased vehicle not as represented); Waterloo Leasing Co. v. McNatt, 620 S.W.2d 194 (Tex. Civ. App. 1981) (failure to disclose total charges

The consumer is turning to deceptive practices acts for various reasons. High on the list of such reasons are the following: attorney's fee awards not otherwise available, the lessening utility of the truth-in-lending action,[34] and the difficulties of winning a Uniform Commercial Code implied warranty or revocation of acceptance action.[35] In Louisiana, however, a significant number of the kind of deceptive practices cases appearing nationwide could be brought under Civil Code articles 2545, 2547, and 2548,[36] thus permitting the buyer to neuter attempted renunciation of implied warranty clauses and to recover damages and attorney's fees. Still, there is reason to believe that in the next few years, cases such as *Phillips* will be assuming a very important role in the protection of consumers in Louisiana.

THE LOUISIANA CONSUMER CREDIT LAW

Deferral and Delinquency Charges on Installment Notes

In a precomputed consumer credit transaction,[37] an installment pay-

in lease, and misrepresentation as to lessee's right to cancel); Sam Montgomery Oldsmobile Co. v. Johnson, 624 S.W.2d 237 (Tex. Civ. App. 1981) (buyer's motor home had been "cannibalized" in order to make other vehicles ready for sale, and parts so taken had not been replaced with factory replacement parts). Undisclosed prior damage has been held to be a deceptive practice in at least three cases: Plaza Pontiac, Inc. v. Shaw, 282 S.E.2d 383 (Ga. App. 1981); Pennington v. Singleton, 606 S.W.2d 682 (Tex. 1980); Chrysler-Plymouth City, Inc. v. Guerrero, 620 S.W.2d 700 (Tex. Civ. App. 1981). *See also* Charlie Thomas Courtesy Ford v. Avalos, 619 S.W.2d 9 (Tex. Civ. App. 1981) (deceptive repairs); Jacobs v. Rosemount Dodge-Winnebago South, 310 N.W.2d 71 (Minn. 1981) (failure to comply with federal requirements pertaining to notification to buyer of defects).

34. The use of model disclosure forms pursuant to the Truth-in-Lending Simplification & Reform Act, 15 U.S.C. § 1604(b) (1980), may reduce significantly the liability exposure of creditors.

35. The consumer-buyer's remedies under U.C.C. §§ 2-314, 2-316, & 2-608 for breach of warranty, nondelivery, or rightful rejection or justifiable revocation of acceptance (U.C.C. §§ 2-711 through 2-715) are not particularly helpful because the consumer, by definition, has no profit motive upon which to premise damages.

36. "The seller, who knows the vice of the thing he sells and omits to declare it, besides the restitution of price and repayment of the expenses, including reasonable attorneys' fees, is answerable to the buyer in damages." LA. CIV. CODE art. 2545.

> A declaration make by the seller, that the thing sold possesses some quality which he knows it does not possess, comes within the definition of fraud, and ought to be judged according to the rules laid down on the subject, under the title: Of Conventional Obligations.
>
> It may, according to the circumstances, give rise to the redhibition, or to a reduction of price, and to damages, including reasonable attorneys' fees, in favor of the buyer.

LA. CIV. CODE art. 2547.

"The renunciation of warranty, made by the buyer, is not obligatory, where there has been fraud on the part of the seller." LA. CIV. CODE art. 2458.

37. LA. R.S. 9:3516(23) (Supp. 1972 & 1980).

ment not paid within ten days after its due date may be deferred by the creditor and a deferral charge imposed therefor, if the parties so agree in writing.[38] Alternatively, the installment not paid within ten days of its scheduled (or deferred) due date may result in a delinquency charge, provided again that the parties have so contracted.[39] But as to an installment not paid within ten days of its due date, the Louisiana Consumer Credit Law does not permit the creditor to both defer the installment (and impose a deferral charge) and impose a delinquency charge.[40]

In *Reliable Credit Corp. v. Smith*,[41] the consumer-borrower failed to make the $185 installments scheduled for November 5 and December 5, 1978, but he did pay $185 to Reliable on December 7, 1978. Reliable deducted $5 from that payment as a delinquency charge and applied the $180 balance to the installment due on November 5. But Reliable also deferred and collected a $46 deferral charge on December 7 for the installment due December 5. Reliable's action on December 7 can be viewed in two ways: the $46 deferral charge applied in fact to the December 5 payment, in violation of the ten-day default requirement, or the deferral charge applied in fact to the November 5 payment, an impermissible imposition of both a delinquency and a deferral charge for that installment. In either case, however, there was no agreement in writing regarding deferral charges.

On September 26, 1979, Reliable Credit properly accelerated the note, credited the borrower for a rebate of unearned precomputed interest,[42] and filed suit for the unpaid balance. The borrower then answered and in December of 1979 sent by certified mail a notice to Reliable of the violations of the Consumer Credit Law. Reliable, presumably in response thereto, then credited the borrower's account on January 31, 1980, in the amount of the $5 delinquency charge of December 7, 1978, and switched the $46 deferral charge from the December 5 installment to the November 5 installment. The trial court permitted the borrower to set off $3,051 against a stipulated amount due of $3,226, and gave judgment for Reliable for the $175 difference, plus legal interest from the date of judicial demand and a 25 percent contractual attorney's fee. The trial court computed the borrower's

38. LA. R.S. 9:3526 (Supp. 1972 & 1974). The parties, before or after default, may agree in writing to a deferral of an installment payment, LA. R.S. 9:3526(A), but if the creditor desires to unilaterally defer a delinquent payment the parties must have so agreed at the time the transaction was entered into. LA. R.S. 9:3526(B).

39. LA. R.S. 9:3525(A) (Supp. 1972 & 1980).

40. LA. R.S. 9:3525(B) & 3526(B).

41. 406 So. 2d 231 (La. App. 1st Cir. 1981).

42. LA. R.S. 9:3529 (Supp. 1972).

set off on the basis of a bad faith violation by Reliable under Louisiana Revised Statutes 9:3552(A)(1),[43] pursuant to which an aggrieved consumer is entitled to a refund of all finance charges[44] and a civil penalty of three times the amount of such charges, together with a reasonable attorney's fee.

Reliable argued that its violation of the credit law was not an "intentional" error or an "error not in good faith"; however, the failure of Reliable to have the matter of deferral in writing was viewed by the court as an unheeded commandment of the law. Moreover, Reliable had demonstrated a lack of good faith when it failed to correct the violation within thirty days of the consumer's notice.[45] The switching of the deferral charge from the December 5 to the November 5 payment did not help Reliable's good faith argument either, for even though a deferral charge may be collected at "any time" after it is assessed,[46] it was ruled that a creditor may not return improperly collected deferral or delinquency charges after suit is filed or the obligation has matured or collection has been turned over to a lawyer or after more than thirty days have passed since notice of the violation with no correction thereof.

The trial court computed the civil penalty in the *Reliable* case to be $3,051 by requiring a refund of $718, the amount of the finance charges actually paid, rather than a refund of $1,104, the total amount of contracted precomputed finance charges; that $718 sum was then multiplied by three and to this was added an attorney's fee of 25 percent of the imposed finance charges (a fee of $179). In this computation method the trial court was held to have erred.

According to the first circuit, the amount of the "refund of all loan finance charges" was properly set at $718, the term "refund" implicitly meaning only those finance charges actually paid by the consumer (or, presumably, owed by the consumer under the Rule of 78's rebate computation method). But, said the first circuit, that figure representing the amount of interest actually imposed is not the correct amount to be tripled; rather, the statutory language "three times the amount of such loan finance charge or credit service charge" means that the amount to be tripled is the total finance charge imposed at the time the loan transaction was entered.

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43. LA. R.S. 9:3552(A)(1) (Supp. 1972).

44. Under LA. R.S. 9:3516(15) & (21), the "finance charges" encompass much more than merely the "interest" charged.

45. LA. R.S. 9:3552(A)(1)(a)(iii) (Supp. 1972); *cf.* LA. R.S. 9:3552(A)(1)(b) (a failure to return an overcharge in finance charges or a deficiency in a rebate within thirty days of notice of violation is presumption of bad faith).

46. LA. R.S. 9:3526(A).

The computation of attorney's fees by the trial court was clearly contrary to Louisiana Revised Statutes 9:3552(G), which requires that the fee be measured by the time reasonably expended by the attorney for the consumer and not by the amount of the recovery. The trial court probably had resorted to the "25% of imposed finance charges" computation not in disregard of the statute, but because the consumer's lawyer did not submit proof of the amount of time expended on the case.[47] The first circuit held, however, that the statute does not require such proof and that a court has the inherent power to fix such fees in any event by simply deducing the amount of work required by the lawyer from the record of the case. Because the case involved somewhat novel and complex issues, and in deference to the expertise of the consumer's lawyer, the first circuit set the fee at $1000. Thus, rather than a set off amount of $3,051, with a balance remaining of $175, the set off amount was $5,030, with $1,804 owing to the consumer.

The first circuit's view of the "refund of all . . . finance . . . charges" and the attorney's fees requirement of Louisiana Revised Statutes 9:3552(G) seems sound, but the court's construction of the "three times the amount of such . . . finance . . . charge" language of that subsection is open to question. The use of the word *such* in the phraseology seemingly has reference to the amount of finance charges to be refundable, and at the least, the statute, contrary to the court's reading thereof, does not make "it clear that the penalty provisions . . . are to be assessed on the basis of the . . . finance charge imposed at the time the loan transaction was entered, rather than on the basis of the finance charges actually collected."[48] Such a legislative intent would certainly have been reasonable and consistent with the notion of a penalty,[49] and in that respect the *Reliable* decision obviously promotes compliance with the law.

Unconscionable Contracts

Section 3551 of the Consumer Credit Law permits a court to refuse to enforce a consumer credit agreement or any clause thereof if the court finds as a matter of law that the clause or agreement was "unconscionable" when it was made.[50] The section is an adopted version of section 5.108 of the Uniform Consumer Credit Code,[51] which section

47. 406 So. 2d at 235.

48. *Id.*

49. The Truth-in-Lending Act's civil penalty provision is "twice the amount of any finance charge in connection with the transaction," 15 U.S.C. § 1640(a)(2)(A)(i) (1976), with "finance charge" defined as the sum of all charges.

50. LA. R.S. 9:3551 (Supp. 1972).

51. (1) With respect to a consumer credit sale, consumer lease, or consumer loan,

in turn was based on section 2-302 of the Uniform Commercial Code.[52] There are approximately fifty reported decisions applying U.C.C. section 2-302 to deny enforcement of a clause or an entire agreement, and apparently no such U.C.C.C. cases. Of the fifty U.C.C. nonenforcement cases, no more than one-half involved consumer transactions, so it is evident that unconscionability has not become a consumer remedy of choice. In fact, the fifty decisions represent an average of one decision per U.C.C. jurisdiction,[53] for a period of about fifteen years.[54] It is not surprising, therefore, that *Community Acceptance Corp. of Denham Springs, Inc. v. Kinchen*[55] is apparently the first court of appeal decision in Louisiana that actually applies section 3551 to deny enforcement of an agreement.

A finding of unconscionability under section 3551 does not have reference solely to the abstract principle stated therein, as interpreted and applied by the U.C.C. decisions. The Louisiana Consumer Credit Law attempts a definition of the term "unconscionability"; a contract or clause is unconscionable when, at the time it is entered into, it was "so onerous, oppressive or one-sided that a reasonable man would not have freely given his consent" thereto.[56] In *Kinchen*, the finance com-

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if the court as a matter of law finds the agreement or any clause of the agreement to have been unconscionable at the time it was made the court may refuse to enforce the agreement, or it may enforce the remainder of the agreement without the unconscionable clause, or it may so limit the application of any unconscionable clause as to avoid any unconscionable result.

(2) If it is claimed or appears to the court that the agreement or any clause thereof may be unconscionable the parties shall be afforded a reasonable opportunity to present evidence as to its setting, purpose, and effect to aid the court in making the determination.

(3) For the purpose of this section, a charge or practice expressly permitted by this Act is not in itself unconscionable.

UNIF. CONSUMER CREDIT CODE § 5.108 (1969).

52. (1) If the court as a matter of law finds the contract or any clause of the contract to have been unconscionable at the time it was made the court may refuse to enforce the contract, or it may enforce the remainder of the contract without the unconscionable clause, or it may so limit the application of any unconscionable clause as to avoid any unconscionable result.

(2) When it is claimed or appears to the court that the contract or any clause thereof may be unconscionable the parties shall be afforded a reasonable opportunity to present evidence as to its commercial setting, purpose and effect to aid the court in making the determination.

U.C.C. § 2-302 (1978).

53. Louisiana and California did not adopt § 2-302, but the Virgin Islands and the District of Columbia did adopt that section, as did the other forty-eight states.

54. By January 1, 1967, forty-one jurisdictions had adopted § 2-302.

55. 417 So. 2d 22 (La. App. 1st Cir. 1982).

56. LA. R.S. 9:3516(30) (Supp. 1972). The definition meshes nicely with the principles of consent, LA. CIV. CODE art. 1819, and interpretation of agreements, LA. CIV. CODE art. 1945, 3d rule.

pany had financed the acquisition of an automobile costing $500 for a consumer, and when that consumer arranged to sell the vehicle to Kinchen, the finance company also financed that transaction. At the time of the resale transaction, the finance company advanced $150 for certain repairs to the vehicle and required the seller-consumer, Kinchen, and his roommate to execute a note in the amount of $1,647. This amount represented the seller's indebtedness to the finance copmany of $844 ($500 purchase price plus loan finance charges) and the $150 repair loan. Unfortunately, no rebate of unearned interest[57] had been made to the seller when, in effect, the prior note was "paid off" by refinancing. That violation, of course, triggered section 3552, which under the first circuit's own earlier decision in *Reliable Credit Corp. v. Smith*[58] could have resulted in an award that probably would have wiped out the obligation. The trial court, however, had found as a fact that the three consumers were "unsophisticated, uneducated people of extremely limited means, all of whom had an imperfect understanding of the transaction,"[59] and had concluded that the difference between the actual value of the vehicle and the size of the note was so great that it amounted to "overreaching" and "exploitation of the unsophisticated, to such a degree that it borders on fraud."[60] The agreement was held to be unconscionable on that basis. The first circuit agreed that the contract was "so onerous, oppressive and one-sided that no reasonable man would have freely consented to it."[61]

The importance of the *Kinchen* case is not to be underestimated. When the Louisiana Legislature enacted section 3551, it intended, upon familiar principles of statutory construction, that the decisions of the courts in other jurisdictions construing U.C.C. section 2-302 and U.C.C.C. section 5.108 be regarded in Louisiana courts as persuasive authority. While such a rule of construction probably is more significant in the case of a less abstract expression of legislative will, it at least meant in the case of section 3551 that the U.C.C. "price unconscionability" cases were arguably persuasive in Louisiana. Exemplary of the U.C.C. "price unconscionability" cases is *Jones v. Star Credit Corp.*,[62] in which enforcement was denied on a contract for the sale of a freezer, having an actual fair retail value of $300, for a total time-price of $1,440 (including $500 in finance charges).[63]

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57. LA. R.S. 9:3528 (Supp. 1972 & 1978).

58. 406 So. 2d 231 (La. App. 1st Cir. 1981).

59. 417 So. 2d at 23.

60. *Id.* It is noteworthy that if trial courts would simply hold that "it is fraud," rather than that "it borders on fraud," LA. R.S. 9:3551 would not be needed.

61. 417 So. 2d at 23.

62. 59 Misc. 2d 189, 298 N.Y.S.2d 264 (Sup. Ct. 1969).

63. *See also* Murphy v. McNamara, 36 Conn. Super. 183, 416 A.2d 170 (1979); Kugler v. Romain, 58 N.J. 522, 279 A.2d 640 (1971); Toker v. Perl, 103 N.J. Super. 500, 247

The first circuit had earlier remanded the case of *United Companies Mortgage & Investment of Hammond, Inc. v. Estate of McGee*[64] to permit the consumer therein to raise section 3551 in defense of the lender's collection suit, expressing unmistakably the view that the definition of "unconscionable" could be met by the facts. In *McGee*, three existing consumer loans, each covered by credit life insurance, were consolidated into one new loan not covered by insurance, despite the lender's knowledge that the borrower was terminally ill.

Although decisions similar to *Kinchen* (and *McGee*) are frequently found in Louisiana Civil Code jurisprudence,[65] no such cases are truly to be categorized as "price unconscionability" decisions. In that regard, *Kinchen* is a significant decision and one that has far-ranging implications. In analyzing the case, however, it must be borne in mind that the scope of section 3551 can be no more than that of the Consumer Credit Law itself; that scope is extremely narrow. The sale of insurance, transactions under public utility tariffs, and retail installments made pursuant to the Motor Vehicle Sales Finance Act are all excluded from the Act.[66] A "consumer credit sale," moreover, must involve two or more installments,[67] and most loans on immovable property are not within the credit law.[68]

TRUTH-IN-LENDING

Carried forward by the Truth-in-Lending Simplification and Reform Act[69] is subsection 1640(b)'s protection of creditors who discover and correct violations of the Act's disclosure requirements:

> A creditor . . . has no liability under this section . . . for any failure to comply with any requirement imposed under this part . . . , if within sixty days after discovering an error, . . . and prior to the institution of an action under this section or the receipt of written notice of the error from the obligor, the creditor . . . notifies

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A.2d 701 (1968); Frostifresh Corp. v. Reynoso, 54 Misc. 2d 119, 281 N.Y.S.2d 964 (Sup. Ct. 1967); State v. ITM, Inc., 52 Misc. 2d 39, 275 N.Y.S.2d 303 (Sup. Ct. 1966).

64. 372 So. 2d 622 (La. App. 1st Cir. 1979).

65. *See* Succession of Molaison, 213 La. 378, 34 So. 2d 897 (1948); Guillory v. Morein Motor Co., 322 So. 2d 375 (La. App. 3d Cir. 1975); Carter v. Foreman, 219 So. 2d 21 (La. App. 4th Cir. 1969); Broussard v. Fidelity Standard Life Ins. Co., 146 So. 2d 292 (La. App. 3d Cir. 1962); Segretto v. Menefee Motor Co., 159 So. 345 (La. App. Orl. Cir. 1935). *See also* Smith v. Everett, 291 So. 2d 835 (La. App. 4th Cir.), *writ denied*, 294 So. 2d 827 (La. 1974); Griffing v. Atkins, 1 So. 2d 445 (La. App. 1st Cir. 1941); Davis v. Whatley, 175 So. 422 (La. App. 1st Cir. 1937).

66. LA. R.S. 9:3512 (Supp. 1972 & 1980).

67. LA. R.S. 9:3516(11) (Supp. 1972 & 1980).

68. LA. R.S. 9:3516(14) (Supp. 1972 & 1980).

69. 15 U.S.C. §§ 57a, 1602-1607, 1610, 1612, 1613, 1631, 1632, 1635, 1637, 1638, 1640, 1641, 1663, 1664, 1665a, 1666, 1666d, 1667d, & 1691f. (Supp. IV 1980).

> the person concerned of the error and makes whatever adjustments in the appropriate account are necessary to assure that the person will not be required to pay an amount in excess of the charge actually disclosed . . . .[70]

A fair reading of that subsection, both as originally enacted[71] and in its amended and restated form, would lead to the belief that the creditor can discover and correct any failure to comply with any requirement imposed under the Truth-in-Lending Act. But the Truth-in-Lending Act evolved between 1969 and 1980 as an esoteric law not to be burdened by fair readings. Two recent decisions have interpreted subsection 1640(b) as providing a defense to the creditor only where the violation is of the mathematical or "clerical error" nature, not of the informational nature. Both *Pearson v. Easy Living, Inc.*[72] and *Thomka v. A.Z. Chevrolet, Inc.*,[73] on which *Pearson* relies, deem that the "whatever adjustments in the . . . account" language implies that the defense only refers to mathematical errors. However, the relationship between adjustments in the account and violations in the nature of mathematical error may be conceded without conceding the ultimate issue.

THE FAIR CREDIT REPORTING ACT

Reports as to "Transactions or Experiences"

One of the stated purposes of the Fair Credit Reporting Act is to assure accuracy of information pertaining to a consumer's credit worthiness.[74] To that end the Act requires that a consumer reporting agency[75] adopt reasonable procedures designed to assure that only accurate information is disseminated and that such information is given only to those who have a permissible purpose in obtaining it.[76] The Act also provides remedies for the consumer aggrieved in regard thereto.[77] One might assume, then, that an erroneous adverse report by a bank to a credit bureau, disseminated by the latter in its credit reports, is violative of the act. That is not the case, however, where, as in *Freeman*

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70. 15 U.S.C. § 1640(b).

71. The only substantive change in the law as revised by the Truth-in-Lending Simplification and Reform Act, Pub. L. No. 96-221, § 615(a)(3), 94 Stat. 168, 180 (1980), is the time within which the error may be brought to the attention of the consumer and corrected. Under original subsection 1640(b) that time was fifteen days after discovery of the error.

72. 534 F. Supp. 884 (S.D. Ohio 1981).

73. 619 F.2d 246 (3d Cir. 1980).

74. 15 U.S.C. § 1681b (1976).

75. 15 U.S.C. § 1681a(f).

76. 15 U.S.C §§ 1681b, 1681c, & 1681e.

77. 15 U.S.C. §§ 1681i, 1681n, & 1681o.

v. Southern National Bank,[78] the erroneous information is a "report containing information solely as to transactions or experiences between the consumer and the person making the report," for that form of information is excluded from the definition of a "consumer report."[79] *Freeman* held that the bank, with respect to the "transactions or experiences" report, was not a "consumer reporting agency"[80] and hence was beyond civil liability under sections 1681n and 1681o of the Act, pertaining to noncompliance by consumer reporting agencies.

The "transactions or experiences" exemption was designed to permit those who deal with consumers to report needed information to consumer reporting agencies without such reports causing the reporter to fall within the definition of a consumer reporting agency, a definition itself dependent on the definition of a "consumer report."[81] The department store, bank, or other creditor does not become a consumer reporting agency by reporting to the credit bureau the credit experience it has had with its customers. Moreover, section 1681h(e) insulates such reporting from state law claims as well:

> No consumer may bring any action or proceeding in the nature of defamation, invasion of privacy, or negligence with respect to the reporting of information against . . . any person who furnishes information to a consumer reporting agency . . ., except as to false information furnished with malice or willful intent to injure such consumer.

Erroneous "transactions or experiences" information, however, can be culled from the files of the credit bureau by virtue of the right the consumer has under sections 1681g, 1681h, and 1681i to dispute the accuracy of the information residing in the credit bureau files.

Problems of the Computerized Consumer Credit Reporting Agency

Credit reporting agencies rely for information primarily on the reports of subscribers, such as retailers and banks, reporting on transactions or experiences with customers. The subscriber is more and more likely to be served by a credit reporting computer in the style of a bank's automated teller. A subscribing merchant with computer capability can gain access to the credit history of a given consumer by feeding certain identifying information from his computer to that of the credit reporting agency (CRA). The CRA in *Thompson v. San Antonio Retail Merchants Association*[82] employed such a system. It was not a totally

78. 531 F. Supp. 94 (S.D. Tex. 1982).
79. 15 U.S.C. § 1681a(d).
80. 15 U.S.C. § 1681a(f).
81. 15 U.S.C. §§ 1681a(d) & (f).
82. 682 F.2d 509 (5th Cir. 1982).

successful operation. The culprit was common surnames.

The problem in *Thompson* arose as follows. One of the CRA's subscribers, Gordon's Jewelers, charged off an uncollected $77 account standing in the name of William Daniel Thompson, Jr., social security number 457-68-5778. The subscriber reported the bad debt to the CRA, which placed the information and a derogatory credit rating into file 5867114, without giving that file any identifying social security number. Subsequently, the plaintiff, William Douglas Thompson, III, applied for credit from two other subscribers, Gulf and Ward's. Plaintiff's social security number was 407-86-4065, and his address, occupation, and marital status were different from that of William Daniel Thompson, Jr.

When Gulf's terminal operator asked the CRA computer about plaintiff Thompson, the computer's response was file 5867114, which the Gulf terminal operator mistakenly accepted as plaintiff's file. As a part of that inquiry, the CRA computer automatically "captured" into file 5867114 various input information about plaintiff, including his social security number—the single most important identifying factor in the system. The result of all of this was that the computer crossbred the two Thompsons: file 5867114 bore the name of William Daniel Thompson, Jr., his former address, and employer, but the social security number, current address, and employer of plaintiff, and the "spouse's name" became that of plaintiff's wife. Such garbled information was reported by the CRA to Ward's when the latter's terminal operator ran a credit check on plaintiff and accepted file 5867114 as that of the plaintiff. Based on the adverse "bad account" information in that file, Ward's twice denied credit to the plaintiff.

A consumer reporting agency is liable to any consumer for negligent failure to comply with "any requirement imposed" by the Fair Credit Reporting Act.[83] The requirement with which the CRA in *Thompson* failed to comply was that of section 1681e(b) of the Act: "Whenever a consumer reporting agency prepares a consumer report it shall follow reasonable procedures to assure maximum possible accuracy of the information concerning the individual about whom the report relates."[84] The procedure whereby the CRA's computer was programmed to automatically capture input information from subscribers fell short of the reasonable care standard because the computer was not programmed to require any minimum "points of correspondence" between the consumer in question and the file into which the incoming information was placed.

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83. 15 U.S.C. §§ 1681-1681t (1976).

84. 15 U.S.C. § 1681e(b). The duty of reasonable preparation extends to updating files, because "preparation" is an ongoing process. Lowry v. Credit Bureau, Inc. of Ga., 444 F. Supp. 541, 544 (N.D. Ga. 1978).

In short, the CRA had no way of knowing if the subscriber-supplied information on the plaintiff correctly went to file 5867114.

The procedures adopted by the CRA in *Thompson* led to a second finding of negligence. Gulf had requested a verification of the adverse credit history ascribed to plaintiff. Such a request should have led the CRA to contact Gordon's and double check the social security number of Gordon's customer, Thompson. Failure to do so[85] also violated the "reasonable procedures to assure maximum possible accuracy" requirement. The trial court's award of $10,000 in actual damages (premised on humiliation and mental distress) and $4,485 attorney's fees (based on 41 1/2 hours of work at $90 per hour) was affirmed.

The consumer reporting agency in *Thompson* actually also violated the requirement of section 1681e(a) that reasonable procedures be maintained to avoid a violation of section 1681b of the Act. Under section 1681b a consumer report may not be furnished unless the agency has reason to believe that the user has, in essence, a permissible purpose therefor. When plaintiff applied for credit at Ward's, for example, Ward's had a permissible purpose for obtaining a credit report on plaintiff.[86] Ward's did not have a permissible purpose in obtaining credit information regarding William Daniel Thompson, Jr. Likewise, no prospective creditor, employer, or insurer to whom William Daniel Thompson, Jr. had applied for credit, employment, or insurance would have had a permissible purpose in receiving credit information pertaining to plaintiff. Yet, due to the crossbred nature of file 5867114, such is exactly what the subscriber would have received.[87]

Editor's Note: Since the completion of this article, the Louisiana Supreme Court rendered its opinion in Reliable Credit Corp. v. Smith, 418 So. 2d 1311 (La. 1982). The author discusses the first circuit's holding in this case in the text, *supra*, at notes 41-49, and questions the first circuit's construction of the "three times the amount of such . . . finance . . . charge" language of La. R.S. 9:353(G) (emphasis added). The author argues that the word "such" refers to the amount of finance charges actually paid, not the total amount of finance charges to be imposed over the life of the loan. The supreme court affirmed, but amended the award in a holding consistent with the position taken in this article, and found the borrower was entitled to recover only three times the amount of the finance charges *actually paid*, as opposed to the sum of the loan charges agreed to at the time the parties entered into the loan transaction.

85. The defendant either failed to contact Gordon's or failed to cross-check the social security number in file 5867114 with that in Gordon's Thompson account.

86. 15 U.S.C. § 1681b(3)(A).

87. This violation was not discussed by the *Thompson* decision. Another violation by the CRA in *Thompson* occurred when plaintiff disputed the accuracy of number 5867114, under 15 U.S.C. § 1681i, in June of 1979. Under that section of the Fair Credit Reporting Act, the CRA's reinvestigation could not have led it to reasonably conclude that the adverse information (Gordon's) was accurate or verifiable as to plaintiff; therefore, the commandment of § 1681i to "promptly delete such (disputed) information" should have been followed. It was not until October 16, 1979, that the CRA informed Ward's of the erroneous information.